Supreme Court, U.S.
FILED
NOV 7 2002
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Nos. 01-1179 and 01-1187

In the Supreme Court of the United States

BANK OF AMERICA, N.A., ETC., PETITIONERS

v.

JULIO ABRAHAM, ET AL.

NORCAL WASTE SYSTEMS, INC., ET AL., PETITIONERS

v.

JULIO ABRAHAM, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Under *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), certain state-law claims can be removed to federal court if the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "completely preempts" them. The question presented is whether ERISA completely preempts state-law claims for breach of fiduciary duty where (a) the plaintiffs are former shareholders of a company who became participants in the company's employee stock ownership plan (ESOP), (b) the defendants include persons responsible for administering the ESOP, and (c) the alleged state-law claims arise from the plaintiffs' receipt of notes when they sold their shares to the ESOP in a leveraged buyout and do not arise from any action taken by the ESOP with respect to plaintiffs as ESOP participants.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Respondents are a group of former stockholders of a predecessor firm of petitioner Norcal. In a 1986 buyout, an ESOP (an Employee Stock Ownership Plan) bought the stock from respondents in return for cash and notes. Forty-four of the 147 respondents continued as employees of the reorganized firm and thus became participants in the ESOP, which is subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Norcal eventually defaulted on its debt to respondents. Respondents filed a state-court action against, *inter alia*, the ESOP

and members of its administrative committee, alleging violation of state-law duties owed to respondents as former stockholders and current noteholders of Norcal. The action was removed to federal court. The court of appeals held that there was no federal removal jurisdiction under the "complete preemption" doctrine, because respondents were suing as former shareholders and current noteholders, not as participants in the ERISA plan, and their claims therefore could not have been brought under ERISA's civil enforcement provisions. Although the court of appeals also concluded that petitioners have no preemption defense on the merits to respondents' state-law claims, the court's holding that the federal court had no removal jurisdiction was sufficient to dispose of this case.

1. In 1986, petitioner Norcal Solid Waste Systems, Inc. (Norcal), created an ESOP as part of the company's leveraged buyout of its employee-shareholders. Pet. App. 3a. Under the buyout, a group of banks, led by petitioner Bank of America, made loans to Norcal, which loaned the money to the newly-created ESOP. *Ibid.* The ESOP then bought the shares of the employee-shareholders for $65 million in cash and $36.5 million in long-term notes. *Ibid.* Respondents are 147 former employee-shareholders (or their representatives) who received those notes in the exchange. See 01-1179 Pet. 7.

The notes were governed by a trust indenture agreement between the ESOP, as obligor, and one of the bank lenders, Security Pacific National Bank, as the trustee. Pet. App. 3a. The indenture was governed by California law. *Id.* at 4a. Under the indenture, the banks could not take action against the ESOP's assets to recover the debt. The indenture also prohibited the ESOP from merging into another entity unless the ESOP first redeemed the outstanding principal on the notes, and it required the indenture trustee to exercise its rights and powers if there was a default. The notes were permitted by regulations that create an exception to

ERISA's prohibition against transactions between an ERISA plan and a "party in interest."[1]

2. In December 1987, Norcal combined with Envirocal, Inc., and the Norcal ESOP combined with Envirocal's ESOP. Pet. App. 5a. In May 1988, Security Pacific, as indenture trustee, told respondent noteholders that no action had been taken that materially affected them. *Ibid.* In September 1988, the ESOP told its participants—44 of whom were among the 147 respondent noteholders—of the transaction. In 1990, the Norcal ESOP merged with another company's ESOP. Norcal and the Norcal ESOP took on additional debt in those transactions. 01-1187 Pet. 9. In April 1991, Norcal defaulted on its debts, and the Norcal ESOP defaulted on its indebtedness to the noteholders. Pet. App. 5a.

3. In 1994, all 147 respondent noteholders filed a state-court action against Norcal, the Norcal ESOP, Norcal's bank lenders, and several individual officers and directors of Norcal. Pet. App. 5a-6a.[2] Bank of America, which had by then merged with Security Pacific, was sued both for its conduct as a lender and for Security Pacific's conduct as trustee under the indenture. *Ibid.*

The complaint sought relief under state law for alleged wrongdoing in connection with the 1986 leveraged buyout, the 1987 Envirocal transaction, and subsequent ESOP activi-

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[1] ERISA generally prohibits transactions between a plan and a "party in interest," a term that includes employers who sponsor a plan and employees who participate in it. 29 U.S.C. 1002(14) (definition of "party in interest"), 1106(a) (prohibition). A non-recourse loan to an ESOP that meets certain conditions is exempt from that prohibition. See 29 U.S.C. 1108(b)(3); 29 C.F.R. 2550.408b-3; 26 C.F.R. 54.4975-7(b).

[2] The court of appeals stated that the officer and director defendants included members of the ESOP's Administrative Committee, without further elaboration. Pet. App. 5a-6a. In fact, two of those defendants were alleged to be directors of Norcal and members of the ESOP committee, but three other "officer and director" defendants were sued only as members of the ESOP committee. See Compl. ¶¶ 16, 19, 22, 23, 24.

ties. Pet. App. 6a. "The acts allegedly resulted in [respondents'] unwitting reliance in tendering their shares in Norcal for restricted notes, the [indenture trustee's] failure to redeem or enforce redemption of those notes at the time of the Envirocal transaction, and the eventual default on [the] notes." *Ibid.* Count 5 of the complaint alleged that the officer and director defendants owed a state-law fiduciary duty to respondents as shareholders that continued after they exchanged their shares for the notes. Compl. ¶ 98. They breached that duty, the complaint alleged, by arranging for Norcal and the ESOP to enter into mergers in violation of the indenture and shouldering massive new debts that were made superior to respondents' notes. *Id.* ¶ 101. As relief, respondents sought general and punitive damages. *Id.* ¶ 103. Counts 4 and 6 made similar allegations against the officer and director defendants and others under constructive fraud and negligence theories. *Id.* ¶¶ 86-95, 104-109.

Forty-four of the 147 noteholders—those who were ESOP participants as well—simultaneously filed a federal court action under ERISA's civil enforcement provision, Section 502(a), 29 U.S.C. 1132(a), alleging that Norcal, the Norcal ESOP, and the individual officer and director defendants who also had been sued in state court had breached their fiduciary duties to the ESOP participants. Pet. App. 6a; Compl. ¶¶ 9-19, *Abraham* v. *Norcal Waste Sys., Inc.*, No. 94-2730 (N.D. Cal. July 29, 1994). Those alleged breaches occurred when the defendants caused Norcal and its ESOP to merge with other companies and their ESOPs in 1987 and 1990 without an adequate investigation and independent advice regarding the participants' interests. *Id.* ¶¶ 15-18. The ESOP participants alleged that those actions violated Sections 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)(A) and (B), which require a fiduciary to act solely in the interest of plan participants, for the exclusive purpose of providing

them benefits, and with a high degree of prudence. Compl. ¶ 19.

4. Norcal, the ESOP, and the individual defendants removed the state-court action to federal court, based on the "complete preemption" doctrine of *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987). Pet. App. 6a. Under that doctrine, a claim pleaded under state law that in fact falls within the scope of ERISA's civil enforcement section, 29 U.S.C. 1132(a), is removable to federal court.

The district court concluded that removal was proper. Pet. App. 21a-22a. The court then asserted supplemental jurisdiction over the remaining claims and parties pursuant to 28 U.S.C. 1367(a). Pet. App. 6a-7a. In 1995, the parties settled all claims except for the respondent noteholders' claims against Bank of America, as successor to the trustee under the indenture. *Id.* at 7a. In 1996, Norcal and the ESOP intervened to obtain a declaration that they had no obligation under the indenture to indemnify the Bank. *Ibid.* Bank of America prevailed, after a jury trial, against the noteholders, and Norcal and the ESOP prevailed on the indemnification issue. The noteholders appealed on the ground that the judgment against them should be vacated because the district court lacked removal jurisdiction, *id.* at 7a-8a, and Bank of America appealed on the indemnification issue.

5. The court of appeals vacated the district court's judgments. Pet. App. 8a-20a. The court reasoned that the district court lacked subject matter jurisdiction over the respondent noteholders' state-court complaint because it did not present a federal question on its face or under the "complete preemption" doctrine. *Id.* at 9a. The court stated that complete preemption may be invoked only if ERISA expressly preempts the state cause of action under Section 514(a), 29 U.S.C. 1144(a), *and* the cause of action is encompassed within ERISA's civil enforcement provision, Section 502(a), 29 U.S.C. 1132(a). Pet. App. 9a. In the court's view,

Section 514(a) does not preempt the state cause of action and the action is outside the scope of Section 502(a). *Ibid.* Accordingly, the court held that removal of the state-court action was improper and ordered it remanded to state court. *Id.* at 8a, 20a.

DISCUSSION

Under ERISA, the "complete preemption" doctrine permits removal of claims that are pleaded on their face as state-law claims but that in fact fall within the exclusive federal cause of action provided by Section 502(a) of ERISA. Respondents' claims do not do so. Forty-four of the 147 respondents were participants in the ESOP, which is an ERISA plan. They brought their state-law claims, however, not in their status as ERISA plan participants, but rather to assert rights that they, like the other 103 respondents, allegedly acquired under state law as former stockholders and current noteholders. Respondents therefore do not assert claims that fall within the scope of ERISA Section 502(a), and their claims accordingly were not properly removed to federal court.

Although the court of appeals' holding that the district court did not have jurisdiction was dispositive, the court also addressed the question whether respondents' state-law claims are preempted under ERISA's express preemption provision in Section 514(a)—*i.e.*, whether petitioners have a valid federal preemption *defense* to respondents' state-law claims *on the merits*. The court held that respondents' state-law claims do not "relate to" an ERISA plan, and are therefore not preempted under Section 514(a). Petitioners contend that that ruling is incorrect.

Insofar as petitioners suggest that an ERISA fiduciary may never be held liable under state law, their argument is too broad. ERISA fiduciaries remain subject to state law insofar as they serve in other roles at the same time, and the ERISA plans they administer remain subject to state laws of

general applicability in other contexts as well. Ultimately, however, the disposition of this case does not turn on whether respondents' state-law claims are subject to "ordinary" preemption under Section 514(a). A federal preemption *defense* on the merits under Section 514(a)—as opposed to "complete preemption" under Section 502(a)—cannot provide the basis for federal jurisdiction. Accordingly, regardless of whether the state law on which respondents rely for their claims on the merits is preempted under Section 514(a) of ERISA, the court of appeals correctly concluded that there is no "complete preemption" of—and thus no federal jurisdiction over—respondents' state-law causes of action. That jurisdictional ruling is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

A. Respondents' Claims Cannot Support Removal Jurisdiction Under The Complete Preemption Doctrine

1. Under 28 U.S.C. 1441(b), a civil action brought in state court that is founded on a claim or right arising under federal law may be removed to federal court. Because preemption is ordinarily a federal defense to the plaintiff's suit, "it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Metropolitan Life*, 481 U.S. at 63. Thus, preemption under Section 514(a) of ERISA, does not, standing alone, authorize removal of a state-court action to federal court. *Id.* at 64; *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

A corollary to the well-pleaded complaint rule "is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life*, 481 U.S. at 63-64. In *Metropolitan Life*, the Court held that a state-law claim alleging improper processing of a claim for

benefits under an ERISA plan is subject to "complete preemption," because it falls within the scope of the "exclusive federal cause of action for resolution of such disputes" created by Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B). Courts of appeals have concluded, and respondents do not dispute, that "complete preemption" also applies to claims that fall within other subsections of Section 502(a).[3]

Removal is permissible under the complete preemption doctrine only when a federal cause of action occupies a field so completely that every claim in that field necessarily arises under federal law, and any attempt to present a state-law claim is "artful pleading" to get around the federal nature of the claim. See *Rivet* v. *Regions Bank*, 522 U.S. 470, 475 (1998); *Lehmann* v. *Brown*, 230 F.3d 916, 919 (7th Cir. 2000). A court faced with such artful pleading will recharacterize the state-law claim to include the necessary federal claim, because a state-law claim within the completely preempted area "is considered, from its inception, a federal claim, and therefore arises under federal law." *Rivet*, 522 U.S. at 476. Conversely, however, a state-law claim outside the completely preempted area does not arise under federal law and is not removable even if there is a valid federal preemption defense to the claim. *Franchise Tax*, 463 U.S. at 25-27.

2. The state-law claims at issue here are not subject to removal under the complete preemption doctrine, because they fall outside the scope of Section 502(a) of ERISA. All 147 respondents—including the 44 who were also partici-

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[3] See, *e.g.*, *Dudley Supermarket, Inc.* v. *Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1, 3-4 (1st Cir. 2002) (breach of fiduciary duty); *Smith* v. *Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999) (same); *Joyce* v. *RJR Nabisco Holdings Corp.*, 126 F.3d 166, 171-172 (3d Cir. 1997) (same); *Romney* v. *Lin*, 105 F.3d 806, 810 (2d Cir.) (suit by fiduciary to collect unpaid contributions), cert. denied, 522 U.S. 906 (1997); *Kramer* v. *Smith Barney*, 80 F.3d 1080, 1083-1084 (5th Cir. 1996) (breach of fiduciary duty).

pants in the ESOP—brought those claims in their capacities as former shareholders of Norcal and current noteholders, and they alleged that petitioners violated duties owed to former shareholders and current noteholders under state law. Compl. ¶ 98. Section 502(a) does not provide for suits by shareholders or noteholders. Section 502(a)(2) authorizes an action "by the Secretary, or by a participant, beneficiary or fiduciary" of an ERISA plan, to obtain appropriate relief against a fiduciary who violates ERISA, and Section 502(a)(3) authorizes "a participant, beneficiary, or fiduciary" to obtain appropriate equitable relief to redress ERISA violations. 29 U.S.C. 1132(a)(2) and (3). Because respondents are not asserting rights they enjoy as participants in or beneficiaries of an ERISA plan, their claims do not arise under Sections 502(a)(2) or (3). Cf. *Franchise Tax*, 463 U.S. at 26-27 (State-court action by a State against an ERISA plan is not subject to removal because Section 502 "does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action * * *. A suit for similar relief by some other party does not 'arise under' that provision.").

Indeed, the proposition that respondents are asserting a claim that does not arise under ERISA follows from the fact that, had the case been brought solely by the 103 respondents who do not also happen to be participants in the ESOP, it clearly would not be completely preempted and could not have been removed. Norcal acknowledges that conclusion (see 01-1187 Reply Br. 4 n.2), and Bank of America does not dispute it. But the claims brought in the state-court action by the 44 respondents who *are* plan participants are precisely the same claims brought by the 103 who are not. Accordingly, if the state-law claims brought by the non-plan-participants do not arise under ERISA, neither do the same claims brought by the plan participants.

B. The Section 514(a) Preemption Issue Does Not Furnish An Independent Basis For Review

Petitioners argue that the state-court action brought by the 44 respondents who are plan participants was subject to removal because those respondents challenge, *inter alia*, the same act—a decision by members of the ESOP administrative committee to approve certain mergers—that formed the basis for an ERISA breach-of-fiduciary-duty action brought in federal court by that same group of 44 respondents. 01-1187 Pet. 13-14; 01-1179 Reply Br. 1, 8. Petitioners contend that if an act is subject to ERISA fiduciary duties, it cannot also be subject to state-law duties because ERISA requires a fiduciary to act solely in the interest of plan participants and beneficiaries, 29 U.S.C. 1104(a)(1)(A), and an individual who serves in a dual capacity must "wear only one [hat] at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram* v. *Herdrich*, 530 U.S. 211, 225 (2000). See 01-1187 Pet. 13-14; 01-1179 Reply Br. 6-7 n.3. Petitioners conclude that if an act is subject to ERISA and not to state law, a state-law claim challenging that act by a person who is a plan participant is necessarily a claim by a participant against an ERISA fiduciary within the scope of Section 502(a). See 01-1187 Pet. 14.

1. Assuming the correctness of petitioners' premise that a given act could never be subject to both ERISA and state law, petitioners' conclusion would nevertheless be incorrect. If a given act is governed solely by ERISA, state-law duties surrounding the performance of that act are necessarily preempted under Section 514(a) of ERISA. Nonetheless, a state-law claim challenging that act brought by a person who happens to be a plan participant is not a claim by a participant against an ERISA fiduciary within the scope of Section 502(a) when the claim is based on duties under state law that are independent of the individual's status as a participant. That conclusion follows from *Caterpillar Inc.* v. *Williams*,

482 U.S. 386 (1987), where employees challenged a defendant's act (termination of employment) solely on state-law grounds (breach of individual employment contracts), even though the employees had federal rights under a subsequent collective bargaining agreement that, if asserted, would have led to complete preemption under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185. See 482 U.S. at 390, 394-395. The Court held that the state-law claims were not completely preempted because "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee." *Id.* at 396.

That reasoning applies in this case. The respondents in this case who are participants in the ESOP, like the employees in *Caterpillar*, are relying on state-law rights (here, as former shareholders and current noteholders) the origins of which predated and which remain independent of the rights they later acquired as ESOP participants. Those state-law rights are not inevitably superseded by the participants' rights under the ESOP. Thus, as in *Caterpillar*, the state-law claims are not completely preempted, and petitioners, like the employer in *Caterpillar*, 482 U.S. at 397-398, had to raise their preemption defense on the merits in state court.

2. Moreover, petitioners' underlying premise—that a given act cannot ever be subject to both state law and ERISA—is incorrect. As petitioners recognize, an individual may serve in "dual capacities," both as a fiduciary of an ERISA plan and in some non-ERISA capacity, such as employer, director of a corporation, or medical care provider. See 29 U.S.C. 1002(21)(A) (person is an ERISA fiduciary "to the extent" that he or she performs certain plan-related functions); see also 29 U.S.C. 1108(c)(3) (employer may act as ERISA fiduciary while also serving as "officer, employee, agent, or other representative of a party in interest" to an

ERISA plan); *Pegram*, 530 U.S. at 223 (HMO may serve as fiduciary and as a provider of medical services); *Varity Corp.* v. *Howe*, 516 U.S. 489, 498 (1996). As a general rule, state-law claims against an individual serving in such "dual capacities" are outside the scope of Section 502(a) of ERISA insofar as they challenge acts taken in the non-ERISA-fiduciary capacity.[4]

To be sure, an ERISA fiduciary ordinarily is required to act solely in the interests of plan participants to the extent the fiduciary is making decisions that are subject to ERISA's requirements. ERISA fiduciaries, however, engage in a variety of activities (*e.g.*, investing in securities, leasing property, lending money) that are subject to state and federal laws generally applicable to those who perform such activities, and they are not free to ignore those laws just because they are ERISA fiduciaries. For example, the trustees of an ERISA plan that owns a commercial building as part of its investment portfolio would be required to comply with building and safety codes and other state laws applicable to such buildings, even if to do so would require the expenditure of funds that in their view would be better preserved for plan beneficiaries. In that situation, the trustees may not ignore state laws of general applicability in order to pursue single-mindedly the interests of plan beneficiaries. In other circumstances, state laws, such as those regulating "securities," may be expressly applicable under

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[4] *Darcangelo* v. *Verizon Communications, Inc.*, 292 F.3d 181, 191-194 (4th Cir. 2002) (participant's claims that plan administrator improperly released confidential medical information not within Section 502(a) of ERISA); *Lazorko* v. *Pennsylvania Hosp.*, 237 F.3d 242, 249 (3d Cir. 2000) (same for participant claims against HMO in its capacity as medical care provider), cert. denied, 533 U.S. 930 (2001); *Rice* v. *Panchal*, 65 F.3d 637, 642-646 (7th Cir. 1995) (same); *Lupo* v. *Human Affairs Int'l, Inc.*, 28 F.3d 269, 271-272 (2d Cir. 1994) (same); *Pohl* v. *National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir. 1992) (dicta) (removal not appropriate if participant sued plan for slip-and-fall injury at plan's offices).

the saving clause in Section 514(b)(2)(A) of ERISA, 29 U.S.C. 1144(b)(2)(A).

In addition, a fiduciary may act in a way that violates both ERISA and state law. For example, a corporate officer who is also a trustee of an ERISA plan may take actions that violate duties owed to a pension plan or its beneficiaries under ERISA and also violate duties owed by the corporation or its directors to minority shareholders, including the plan, under state law. See *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enters., Inc.*, 793 F.2d 1456, 1458, 1468-1469 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987). Such an individual may reasonably be held liable for breach of both ERISA and state-law duties in at least some circumstances, because he typically would have voluntarily assumed such dual obligations, may generally be able to act consistently with both sets of duties (cf. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 100 (1993)), and can generally take steps—such as resigning from the ERISA role—to avoid conflicts. See 793 F.2d at 1469; *Donovan* v. *Bierwirth*, 680 F.2d 263, 271-272 (2d Cir.), cert. denied, 459 U.S. 1069 (1982). The alternative advocated by petitioners would allow individuals who have state-law duties to assume inconsistent ERISA responsibilities and then argue that their new ERISA responsibilities eliminate their state-law duties.

3. In this particular case, difficult questions are raised by petitioners' claim that Section 514(a) of ERISA preempts respondents' claim against the "officer and director" defendants who were sued in their capacities as members of the ESOP administrative committee. The state-court complaint may be read to allege that the committee members had a state-law duty to act (at least in part) in the interest of all 147 respondent noteholders when deciding whether to approve the Envirocal merger. See Compl. ¶¶ 22, 23, 24, 98, 101. A state law requiring an ERISA fiduciary, based on the

interests of the noteholders, to vote for or against a merger of a corporation in which the plan owns stock would appear to conflict with the specific requirement in Department of Labor regulations that a fiduciary, in voting an ESOP's shares, "consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives." 29 C.F.R. 2509.94-2 (proxy voting). Assuming that there is no state-law duty of general applicability that properly attaches to the shares and voting rights held by the ESOP in those circumstances, such a conflict could lead to preemption of state-law claims against the fiduciaries. See, *e.g.*, *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 150 (2001). On the other hand, there may be more room for the operation of state law if the complaint is read to allege that specific officer and director defendants breached a pre-existing state-law duty by putting themselves in a position (as ERISA fiduciaries) where they could have to act in conflict with their state-law duties.

4. Whether the court of appeals erred in finding no preemption under Section 514(a), however, does not affect the ultimate disposition of this case. The court's judgment rests on an ultimate conclusion that respondents' state-law claims were improperly removed to federal court—a conclusion that does not depend on the correctness of the court of appeals' preemption analysis under Section 514(a). Furthermore, the court's analysis under Section 514(a) may have limited precedential value, because the court did not discuss the portions of the complaint on which petitioners rely in this Court in arguing for preemption. In particular, the court did not address the significance of respondents' apparent allegations (see note 2, *supra*) that three individuals were sued solely for actions taken in their capacities as ERISA fiduciaries. See Pet. App. 5a-6a (noting only that state-court action was commenced against "several individual officers

and directors of the defendant corporations (*including some members of the ESOP Administrative Committee*)") (emphasis added). Moreover, the court's finding of no preemption under Section 514(a) should have little effect even on the parties in this case. All of the parties, except petitioner Bank of America, have settled their claims with respondents. *Id.* at 7a. Assuming that those settlements remain binding, the only issues that remain open concern respondents' state-law claims against Bank of America as successor to the trustee under the indenture agreement, and whether Norcal and the Norcal ESOP have indemnity obligations to Bank of America on those claims. *Ibid.* Those claims are not subject even to ordinary preemption under Section 514(a) of ERISA. Review of the question whether Section 514(a) would preempt other claims, which have already been settled, is unwarranted.

C. The Court Of Appeals' Discussion Of The Prohibited Transaction Exemption Has No Bearing On The Removal Or Preemption Issues

Bank of America contends (01-1179 Pet. 13) that "[t]he Ninth Circuit's decision is grounded on the fact that the challenged transactions are exempt from certain restrictions that generally apply to ERISA plans and fiduciaries"—the "prohibited transaction" rules that preclude certain transactions between a plan and a "party in interest." See note 1, *supra*. Bank of America asserts (Pet. 13) that the court of appeals "concluded that, because the transactions at issue were 'expressly exempted from the prohibited transaction provision,' they were not regulated by ERISA and thus were subject to regulation under state law"—a conclusion that Bank of America asserts conflicts with *Moench* v. *Robertson*, 62 F.3d 553, 567-573 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996), and other decisions.

Even if all of the above contentions were correct, they would concern only the Ninth Circuit's holding on ordinary

preemption under Section 514(a) of ERISA—not the dispositive jurisdictional holding that removal was improper because this case is not subject to complete preemption. In any event, Bank of America's contentions are not correct. The court of appeals did not ground its decision that ERISA does not preempt the participant-noteholders' state-law claims on the fact that transactions between an ESOP and parties in interest are subject to exemption from ERISA's rules prohibiting transactions involving parties in interest. Nor did the court find that the exemption from ERISA's prohibited transaction rules for some transactions means that those transactions are not subject to ERISA at all. Rather, the court simply concluded that the participant-noteholders' claims based on asserted state-law duties owed to former shareholders and current creditors "did not implicate the prohibited transaction provision" of ERISA, and that, as a result, their "status as 'parties in interest [under ERISA] is irrelevant'" to their state-law claims. Pet. App. 12a. Indeed, petitioners themselves rely on the participant-noteholders' status as plan *participants*—not their status as parties in interest—to support their preemption arguments. See, *e.g.*, 01-1179 Pet. 14 (ERISA governs transactions that fall within the prohibited transaction rules because ERISA fiduciaries must "act solely in the interest of *plan participants and beneficiaries*") (emphasis added).

As the court of appeals observed, by crafting exceptions to the prohibited transaction rules, Congress presumably intended that, "in all respects *unrelated to the objectives and administration of ERISA*," state law would govern the transactions that the exceptions allow. Pet. App. 13a. That conclusion is consistent with Bank of America's contention that in other respects that *are* related to the objectives and administration of ERISA, "ERISA *does* govern transactions that fall within the exemptions to ERISA's prohibited transaction provisions for ESOPS." 01-1179 Pet. 13.

D. There Is No Conflict In The Circuits

Petitioners assert that the court of appeals' decision conflicts with decisions of five other courts of appeals. 01-1179 Pet. 13-19; 01-1187 Pet. 19-24.[5] There is no conflict, however, because each of the cases cited by petitioners involved a claim that arose from a relationship governed by ERISA. Accordingly, none of those decisions addressed the issue presented here: whether ERISA completely preempts state-law claims by ERISA participants based on alleged violations of pre-existing and independent state-law duties.[6]

1. In *Smith* v. *Provident Bank*, 170 F.3d 609 (6th Cir. 1999), an ERISA plan participant brought suit in state court alleging that a bank had breached a fiduciary duty under state law when it took stock out of the plaintiff's ERISA-plan account to correct an error it had made in another customer's account. *Id.* at 612. The court held that removal

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[5] Bank of America expected this Court's decision in *Rush Prudential HMO, Inc.* v. *Moran*, 122 S. Ct. 2151 (2002), to address removal. See 01-1179 Pet. 19. *Rush* did not address removal, except to restate the "complete preemption" rule and to suggest that a suit to compel compliance with the state HMO law could have been considered a suit to compel compliance with an ERISA plan or a suit to recover benefits under Section 502(a) of ERISA. 122 S. Ct. at 2157 & n.2, 2164-2165.

[6] Bank of America sees a conflict with this Court's recognition that ERISA is intended to create a uniform body of federal law to govern the obligations of ERISA fiduciaries. 01-1179 Pet. 18 (discussing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989)). *Firestone* did not, however, address removal jurisdiction, or suggest that complete preemption is required whenever uniformity is threatened. Indeed, it is clear that complete preemption does *not* follow whenever uniformity is threatened by a state-law claim. As petitioners apparently acknowledge (see p. 9, *supra*), a state-law action by the 103 respondents who were not participants in the ERISA plan would not have been subject to removal. Yet such an action would raise precisely the same issues regarding the uniformity of obligations imposed on fiduciaries as does this action, brought by all 147 respondents. See *Franchise Tax Bd.*, 463 U.S. at 4 (removal improper, notwithstanding presence of "important" ERISA preemption issue that "must eventually receive a definitive, uniform resolution").

of the case to federal court was proper, reasoning that ERISA preempted the state-law breach-of-fiduciary-duty claim and that removal was proper because "[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan necessarily presents a federal question." *Id.* at 614.

In contrast to the plaintiff's claims in *Provident Bank*, respondents' asserted state-law "fiduciary duty" rights are independent of the ERISA plan because they existed regardless of whether some former shareholders and hence current noteholders later became ESOP participants. Accordingly, the Sixth Circuit's statement that "[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan necessarily presents a federal question," 170 F.3d at 614, means only that a claim for breach of an *ERISA* fiduciary duty—*i.e.*, one that grows out of a participant-fiduciary relationship under ERISA—necessarily presents a federal question. Thus, the Sixth Circuit's decision is consistent with the Ninth Circuit's decision here.[7]

2. For similar reasons, *Smith* v. *Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992), does not conflict with the decision in this case. In *Dunham-Bush*, an employee brought an action in state court to enforce an oral promise by his employer to provide pension benefits. *Id.* at 7. The Second Circuit held that ERISA preempted the claim because it was "an attempt to supplement the plan's express provisions and secure an additional benefit." *Id.* at 10. The court also held that the state-law claim could be removed to federal court because a

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[7] In holding that the state-law claim in *Provident Bank* was subject to removal, the Sixth Circuit cited the Fifth Circuit's decision in *Kramer*. See 170 F.3d at 614. *Kramer*, like *Provident Bank*, found removal jurisdiction with respect to a plan participant's claim against a fiduciary for mismanaging stock in his account. See *Kramer*, 80 F.3d at 1082. *Kramer* coexists in the Fifth Circuit with *Sommers Drug*, which held that ERISA does not preempt state-law claims that arise from a corporation's "parallel but independent" duties to its shareholders. *Sommers Drug*, 793 F.2d at 1468; see Pet. App. 14a-15a (Ninth Circuit's reliance on *Sommers Drug*).

"claim for add-on benefits necessarily falls within the intended scope of the civil enforcement provisions of section 502(a)(1)(B)." *Id.* at 11. Thus the state-law rights asserted in *Dunham-Bush*, unlike those in this case, arose directly from the employee's status as a plan participant.[8]

3. In *Hull* v. *Fallon*, 188 F.3d 939 (8th Cir. 1999), cert. denied, 528 U.S. 1189 (2000), a plan participant brought a state-court malpractice action against a doctor who was also the plan administrator, based on the doctor's failure to authorize medical treatment. *Id.* at 941. The court held that the action fell within the scope of Section 502(a) of ERISA because the defendant was acting as plan administrator rather than the participant's treating physician, and "the essence of [the] claim rests on the denial of benefits." *Id.* at 943. *Hull* thus did not address a case like this, in which the plaintiffs' claims are independent of their status as plan participants. Nor did *Hull* question the Eighth Circuit's prior recognition in *Martin* v. *Feilen*, 965 F.2d 660, 667 (1992), cert. denied, 506 U.S. 1054 (1993), that fiduciaries of an ESOP have both duties under ERISA and state-law duties as corporate stockholders.

4. The Seventh Circuit's decision in *Jass* v. *Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1489-1490 (1996), held that a state-law negligence claim was actually a denial-of-benefits claim covered by Section 502(a) of ERISA, and its decision in *Bartholet* v. *Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (1992), held that ERISA completely preempts an

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[8] Contrary to Bank of America's assertion (01-1179 Pet. 16), there is also no conflict with the Second Circuit's decisions in *LoPresti* v. *Terwilliger*, 126 F.3d 34 (1997), and *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (1992). In those cases, the court held that Section 514(a) of ERISA preempts a state-law action for conversion, brought by an ERISA plan trustee or plan participants to recover plan losses from another fiduciary or a third party that dealt with the plan. See *LoPresti*, 126 F.3d at 41; *Diduck*, 974 F.2d at 288. Neither case involved rights that were independent of the operation of the ERISA plan.

employee's state-law claim alleging breach of a promise to establish a pension plan that gave certain pension credit to the employee. Both cases thus involved claims that, unlike respondents' claims here, arose from the basic ERISA participant-plan relationship.

5. Finally, in *Glaziers & Glassworkers Union Local No. 252 Annuity Fund* v. *Newbridge Securities, Inc.*, 93 F.3d 1171 (3d Cir. 1996), a plan fiduciary brought a federal court action against a brokerage firm alleging that a failure to disclose certain information about one of the firm's employees violated ERISA and state-law fiduciary duties. The Third Circuit concluded that ERISA did not necessarily preempt the state-law claims to the extent that the brokerage firm was not an ERISA fiduciary. *Id.* at 1185. The court had no occasion to—and did not—consider the application of the complete preemption doctrine. Nor did the Third Circuit address even the narrow preemption issue under Section 514(a) in this case: whether an ERISA fiduciary taking action that affects another person both as an ERISA participant and in an unrelated status may be subject to both federal and state law.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2002